Rule Traps

by Gregory P. Joseph

The Federal Rules of Civil Procedure change with the telephone directory. Every year, something is tweaked, torn, wrenched, or rewritten. Most of this is merely annoying. Sometimes, though, buried amid the clutter is an amendment that carries a real wallop for major aspects of practice.

The result of the changes over the past decade has been a sea change in federal practice. It has occurred surreptitiously. The results have been telling: evidence preclusion. Expert spoliation. Electronic spoliation. Adverse inferences. The 1993 and 2000 amendments to the Federal Rules of Civil Procedure—civil procedure, mind you, not evidence—have had, and are continuing to germinate, a profound effect on trial through their revolutionary impact on pretrial proceedings and, in several instances, the admissibility of evidence.

A few illustrations:

- **TRO.** You are in the midst of discovery in an interminable commercial litigation. The other side files an emergency motion for a temporary restraining order (TRO) to stop your corporate client from consummating a business transaction, on the ground that the transaction would nullify its ability to obtain complete relief in the litigation. You fire back an affidavit, from a corporate employee, designed to show that your opponent cannot demonstrate a likelihood of success on the merits. At oral argument, your adversary moves to strike the affidavit because that particular employee is not listed by name in your mandatory Rule 26(a)(1)(A) witness disclosure. You respond that there is nothing unique about this employee—others who were disclosed could just as well have supplied the information—but this was an emergency motion, he was available, and there is no time to substitute someone else in the middle of argument. Is the affidavit in or out?
- **Summary Judgment.** In response to a summary judgment motion, you offer an affidavit your investigator obtained a few months earlier from a third-party witness whom you had identified by name in your Rule 26(a)(1)(A) witness disclosure. Your opponent nonetheless moves to strike the affidavit on the ground that the affidavit is plainly a relevant "document" that has been in your possession for months and supports your claims or defenses, but was never disclosed in your Rule 26(a)(1)(B) document disclosure. You argue that the affidavit constituted work product until you decided to use it. Is the affidavit in or out?
- **Third-Party Deposition.** You are taking a third-party deposition at a remote, out-of-state location. You begin to question the witness about a document unearthed by your investigator during the pendency of the lawsuit. Opposing counsel objects on the ground that the document was not described in your Rule 26(a)(1)(B) document disclosure. You respond that you did not even have the document when that initial disclosure was filed, and you obtained it only through work product. Is the testimony you take concerning the document subject to exclusion?
- **Expert Deposition: Notes.** The other side is deposing your expert. Counsel asks about every conversation the expert has had with you since the beginning of the case. You object but permit the answers to avoid looking defensive. Your opponent asks whether any notes reflect the substance of the conversations. The expert testifies that she did not take any notes but acknowledges that on occasion you appeared to be doing so. Counsel demands to see your notes, and you claim privilege. After the deposition, counsel serves a subpoena on you for your notes reflecting conversations with the expert. You object on privilege grounds, and the issue is presented to the court. Are your notes discoverable?
- **Expert Deposition: Drafts.** At the expert deposition, opposing counsel asks about drafts of the expert's report. The expert testifies that there were a few but that all were destroyed. Counsel asks why, and the expert testifies that you advised her that she need not keep drafts. Counsel asks how the drafts differed from the final. The expert can't be sure, saying that it was an "iterative process." Counsel asks whether there were any mark-ups of drafts done by others,

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and the expert testifies that another expert you have retained reviewed it and returned a draft with comments. Counsel moves to preclude the expert from testifying or, in the alternative, to inform the jury about the destruction of the drafts and to instruct them that they can draw an inference adverse to your position. Result?

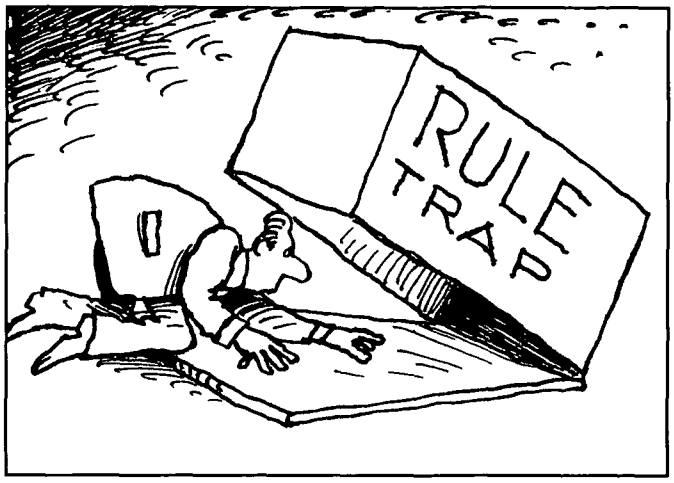
- **Electronic Production Problems.** Big case. Fast track. Some months into fact discovery, your client determines that it lacks the internal resources to pull e-mail from the backup tapes pertaining to the relevant period. You hire an expert IT consulting firm, but, after an extended effort, it finds that it cannot retrieve e-mails from the backup tapes either. A few days before trial, you agree to produce the tapes themselves so your adversary can see that retrieval is impossible. Within a few days, your adversary's expert isolates 950,000 retrievable e-mails—but now there is no time to review them. Your opponent moves for sanctions for your negligent delay in producing the e-mail, requesting that the jury be permitted to draw an adverse inference that the late-produced e-mails contain information highly negative to your case. Instruction given?

Buried Rule

The key to these hypotheticals is the most important rule of evidence that is buried in the Federal Rules of Civil Procedure—Rule 37(c)(1)—and how it interacts with the mandatory disclosure rules. As amended in 1993 and 2000, Rule 37(c)(1) presumptively excludes all evidence that should have been, but was not, disclosed as required by Rule 26(a) or produced in discovery pursuant to Rules 26-36, unless "substantial justification" or "harmless" error can be shown. Rule 37(c)(1) provides:

> A party that without substantial justification fails to disclose information required by Rule 26(a) or 26(e)(1), or to amend a prior response to discovery as required by Rule 26(e)(2), is not, unless such failure is harmless, permitted to use as evidence at a trial, at a hearing, or on a motion any witness or information not so disclosed. ... [S]anctions may include any of the actions authorized under Rule 37(b)(2)(A) [deeming matters admitted], (B) [barring a party from supporting or opposing designated matters], and (C) [striking pleadings, ordering dismissal or default] and may include informing the jury of the failure to make the disclosure.

Preclusion is "a 'self-executing,' 'automatic' sanction to 'provide[]a strong inducement for disclosure of material....'" *Yeti by Molly Ltd. v. Deckers Outdoor Corp.*, 259 F.3d 1101, 1107 (9th Cir. 2001). It "is 'automatic' absent a determination of either 'substantial justification' or 'harmlessness.'" *Amex v. Mopex, Inc.*, 215 F.R.D. 87, 93 (S.D.N.Y. 2002). The automatic preclusion stated in the first sentence of this rule presumptively prevents use of any undisclosed evidence "at a trial, at a hearing, or on a motion." This pretty much covers the waterfront. Your memoirs remain an option. The last sentence offers a parade of other available sanctions, but these "are primarily intended to apply when a party fails to disclose evidence helpful to an opposing party." *Southern States Rack & Fixture, Inc. v. Sherwin-Williams Co.*, 318 F.3d 592, 596 n.2 (4th Cir. 2003). That picks up the last three hypotheticals. But it is the self-executing preclusion remedy that applies when you affirmatively attempt to offer evidence that you haven't



disclosed, and this governs hypotheticals one through three.

The impact of the preclusion remedy is compounded by the rule's seemingly innocuous reference, in the first sentence, to Rule 26(e)(1). Rule 26(e) is the supplementation rule, and subdivision (1) requires that prior disclosures be augmented if and to the extent that "the party learns that in some material respect the information disclosed is incomplete or incorrect and if the additional or corrective information has not otherwise been made known to the other parties during the discovery process or in writing." Therefore it is no defense that the undisclosed matter was unavailable, or did not exist, at the time the initial disclosure was made. Once it is obvious that the disclosure was omissive, it must be supplemented. This presents one of the problems in the first three hypotheticals at the beginning of this article.

There is also, though, a savings provision in Rule 26(e)(1). Nondisclosure is forgiven if the additional information has "otherwise been made known to the other parties during the discovery process or in writing." This presents some problems in the expert setting (*see* Gregory P. Joseph, "Expert Approaches," Volume 25, No. 4, LITIGATION at 20 (Summer 2002)), but it can be an invaluable escape hatch in, for example, the TRO hypothetical, if as is likely the affiant's name has cropped up in the course of discovery. *Fleet Capital Corp. v. Yamaha Motor Corp., U.S.A.*, 2002 U.S. Dist. LEXIS 17502, at *6 (S.D.N.Y. Sept. 19, 2002).

Breadth of Mandatory Fact Disclosure

The threshold issue in assessing all of the hypotheticals but the last concerns precisely what the mandatory disclosure rules require, and this is not as straightforward as it might appear. Rule 26(a)(1)(A) and (B) generally require disclosure of the identities of witnesses and documents "that the disclosing party *may use to support its claims or defenses, unless solely for impeachment*...." On first glance, one is tempted to ask just what problem the drafters thought they were curing. Who, exactly, is hiding the good stuff? It isn't as though there was a widespread problem of concealment of favorable evidence before the 2000 amendment to Rule 26(a)(1). Unfavorable evidence is another matter, and that was addressed by the 1993 version of Rule 26(a)(1), which required parties to disclose all witnesses and documents "relevant to disputed facts alleged with particularity in the pleadings." That provision, however, was rescinded effective December 1, 2000.

The Rule 26(a)(1) disclosure obligation is now so limited

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that one is tempted to ask what the point of the requirement is. The Committee Note provides that "[a] party is no longer to disclose witnesses or documents, whether favorable or unfavorable, that it does not intend to use." The cases are in accord that, if you don't intend to use particular witnesses or documents, you need not disclose them. *See, e.g., Gluck v. Ansett Australia Ltd.*, 204 F.R.D. 217, 222 (D.D.C. 2001). But even if you have no intention of hiding something, the situation is considerably knottier than you might think.

Use. To begin with, "use" is defined in the Note to include "any use at a pretrial conference, to support a motion, or at trial." Hence the issues in the TRO and summary judgment hypotheticals. If disclosure was not made as required by Rule 26(a)(1), and the information has not timely been supplemented as required by Rule 26(e)(1), then it is presumptively excluded under Rule 37(c)(1). *See, e.g., Sears, Roebuck & Co. v. Goldstone & Sudalter*, 128 F.3d 10, 18 n.7 (1st Cir. 1997) (affirming exclusion of affidavit submitted on summary judgment because affiant had not been identified as a knowledgeable witness pursuant to Rule 26(a)(1)). One way to address this, in either the TRO or summary judgment setting above, is to send a supplemental disclosure together with your motion papers (or, better yet, before). It may appear to be a formality, but there is no point in risking Rule 37(c)(1) preclusion.

What is more, the 2000 Committee Note expands the definition of "use" beyond the Rule's text: "The disclosure obligation is also triggered by intended use in discovery...: use of a document to question a witness during a deposition is a common example." The absence of any reference to discovery in the text of the rule is a significant omission. This note explains one of the problems in the third-party witness hypothetical. If you have not disclosed something, you presumptively may not use it at a deposition or otherwise in discovery. Does handing it to the opposing lawyer at the time of the deposition suffice? If it did, that would effectively nullify the disclosure obligation. What about turning it over the day before? Two days? A week? It is dangerous to play games. If a judge determines that your supplementation has been abusively timed, you are subject to sanction for violation of Rule 26(e).

Impeachment Exception. The exception to mandatory disclosure contained in the phrase "unless solely for impeachment" also should be viewed warily. It is drawn from Rule 26(a)(3) (the disclosure provision that kicks in if no pretrial order is entered). Many documents that are offered for impeachment purposes also have non-impeachment qualities that advocates will be loath to lose. For example, a document explicitly or implicitly adopted by an adverse party is admissible for its truth, as an admission, not merely to impeach, under Rule 801(d)(2). Or you may want to "use" it to refresh recollection (under Rule 612), or seek to admit it as past recollection recorded (Rule 803(5)), or as covered under any other hearsay exception.

Fact Disclosure vs. Work Product

The summary judgment hypothetical raises the question whether Rule 26(a)(1) disclosure obligations trump work product protection for an affidavit obtained from a third-party witness. This is not a Rule 26(a)(1)(A) question. "That rule simply requires disclosure of names and addresses of those individuals who might have discoverable information along with the subject of such information. There is no requirement for disclosure of interviewees' statements, in comparison to the rule that mandates disclosure of certain retained expert opinion." *Haga v. L.A.P. Care Services*, 2002 U.S. Dist. LEXIS 1605, at *5 (E.D. Va. Feb. 1, 2002).

There is, however, a Rule 26(a)(1)(B) question, since that provision requires production of "all documents, data compilations, and tangible things that ... the disclosing party may use to support its claims or defenses." The general answer is that, unlike the expert disclosure requirements of Rule 26(a)(2)(B), the fact disclosure obligations of Rule 26(a)(1) do not mandate waiver of work product, but failure to waive will limit the utility of undisclosed evidence at trial.

The summary judgment hypothetical is based on a Northern District of California case, *Intel Corp. v. Via Technologies*, 204 F.R.D. 450 (2001), which reasoned that, if a party has disclosed the identity of a witness pursuant to Rule 26(a)(1)(A), the party is free to use a declaration obtained from that person without having previously disclosed it to the other side, even though the declaration is arguably a "document" within Rule 26(a)(2). The court observed:

1. "In form, a declaration resembles a 'document.' In substance, however, it is testimony." "An affidavit may be a 'document' within the meaning of the rule in some unusual instances, but the classic declaration gathered in the anticipation of a summary-judgment motion is not within the purview of the 'document' concept."
2. "[T]he declaration at issue was clearly work product right up until the moment it was filed," and Rule 26(a)(1) "does not expressly require disclosure of work product."
3. "[W]hen a fact witness is disclosed, all parties are on notice that the disclosing side contends the witness has relevant knowledge ... [and] may well have interviewed the witness and may have even obtained a statement."
4. "[I]f this case proceeds to trial, the declaration at issue would be usable for impeachment. ... For impeachment, the declaration need not be disclosed." *Intel*, 204 F.R.D. at 451-52.

This result is salutary and the reasoning largely unimpeachable, although it would have been simpler to limit the analysis to items two and three—i.e., to say that the declaration was protected as work product until it was used and that because the opponent was aware of, and free to contact, the witness, the opponent had no legitimate complaint. Because declarations are writings, it is counterintuitive to describe them as something other than "documents," because that gives them a unique status under Rule 26(a) that is inconsistent with the breadth that the term "document" is given under the remainder of Rule 26 and the rest of the rules, such as Rule 34.

The *Intel* court's impeachment analysis makes the important point that the failure to disclose may have other consequences. That declaration may no longer have been usable for any purpose at trial other than impeachment because it was not disclosed, and there are other non-impeachment uses to which it might have been put, such as past recollection recorded. In a footnote, the *Intel* court seemed to indicate that it would permit the use of the declaration to refresh recollection at trial, even though that would be a "use" within Rule 37(c)(1). *Id.* at 252 n.1. Query whether, if the proponent of the witness wanted to use the declaration at a deposition for that purpose, the court would permit it to do so, in light of the Advisory Committee's clear statement in the 2000 Notes that

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"use of a document to question a witness during a deposition" constitutes a use within the meaning of the rule. That is the third-party witness hypothetical.

"Substantial Justification" and "Harmless" Error

Caught in the sights of Rule 37(c)(1), you can avoid the preclusion remedy if you can show "substantial justification" for your non-disclosure, or that it was "harmless." In a twist, the burden of proving substantial justification or harmless error falls on the party that failed to make disclosure, not on the party seeking to enforce the preclusion sanction. *Wilson v. Bradlees of New England, Inc.*, 250 F.3d 10, 21 (1st Cir. 2001).

In assessing substantial justification, the "empty head, pure heart" defense is viable. Courts generally look at whether the omission was a product of good faith (e.g., honest belief disclosure was not called for) or negligence (e.g., failure to become aware of disclosable information despite reasonable efforts) as opposed to intentional misconduct. "Harmlessness" is a more objective inquiry, including whether there was prejudice to the adversary, and whether he or she intentionally or negligently turned a blind eye to the absence of disclosure. Either way, because this is your burden as the proponent of the evidence, you're better off not finding yourself in this dilemma to begin with.

Practice Pointers: Rule 26(a)(1). There are several practical ways to ameliorate the problems posed by the first three hypotheticals.

First, ensure that persons whose affidavits are offered, and documents that are submitted, in the course of motion practice have been identified either in a Rule 26(a)(1) disclosure or made known in the course of discovery. If not, as proponent of the affidavit or document, send a supplementation of your disclosure prior to filing the papers. Rule 26(e)(1) doesn't require any formality in supplementing disclosures—the undisclosed matter simply must have "otherwise been made known to the other parties during the discovery process or in writing." If you are opposing the affidavit or documents and no supplementation has been made, invoke Rule 37(c)(1), like the opposing lawyer in the first hypothetical. Then, the issue will be substantial justification or harmless error.

In assessing substantial justification, the "empty head, pure heart" defense is viable.

Second, bear in mind the tension between the work product doctrine and the document disclosure obligation of Rule 26(a)(1)(B). You have a right not to disclose third-party witness statements or declarations under Rule 26(b)(3). But if you intend to use them affirmatively, as on a substantive motion, in a deposition, or perhaps even with an expert, the strictures of Rule 26(a)(1)(B) may require you to disclose them—or be limited to impeachment use only. That is the unhappy result facing the proponent of the affidavit in hypothetical number two.

Third, the duty to disclose documents or other materials that are "used" in discovery, as in the third hypothetical, means that you have to deal with the same "work product vs. use" issues in the third-party deposition setting. If you are going to use a document in a deposition other than for impeachment and the other side may not have seen it, consider the option raised by the Committee Note to Rule 30(d)(2), which was amended in December 2000 to impose a presumptive seven-hour limit on each deposition. To avoid time pressure, the note recommends "send[ing] copies of the documents to the witness sufficiently in advance of the deposition so that the witness can become familiar with them." In other words, pile it in with all the rest.

Expert Spoliation Problems

The fourth and fifth hypotheticals raise a collection of related questions: Can you properly instruct your experts to destroy drafts of their reports as they are working toward the final? Does it matter whether those drafts bear or reflect the comments of others? What if the comments reflected on the drafts are yours? Must communications with experts—including your e-mails—be preserved? Are your notes of conversations with your own experts discoverable? These questions raise issues of privilege and spoliation.

We live in an era of spoliation. Parties long not so much for documentary evidence as for evidence that documents have been destroyed. That applies with emphasis in the expert arena.

The threshold question is whether the materials—notes, drafts, communications with experts—are discoverable. If so, there is necessarily a duty to preserve them because by definition there is a pending or reasonably foreseeable lawsuit. *West v. Goodyear Tire & Rubber Co.*, 167 F.3d 776, 779 (2d Cir. 1999).

Impact of Rule 26(a)(2)(B). The discoverability of expert-related materials turns largely on an analysis of Rule 26(a)(2)(B), the expert report requirement added in 1993. This rule mandates disclosure not only of "a complete statement of all opinions" but also of "the data or other information considered by the witness in forming the opinions." The critical word is "considered." The 1991 draft of this rule originally proposed limiting the disclosure obligation to materials on which the expert "relied," but that was deleted as too restrictive.

"'Considered,' which simply means 'to take into account,' clearly invokes a broader spectrum of thought than the phrase 'relied upon,' which requires dependence on the information." *Karn v. Ingersoll Rand*, 168 F.R.D. 633, 639 (N.D. Ind. 1996) ("considered" is satisfied where experts have "reviewed" documents "related to the subject matter of the litigation ... in connection with forming their opinions"). The 1993 Committee Note to Rule 26(a)(2)(B) remarks, "Given the obligation of disclosure, litigants should no longer be able to argue the materials furnished to their experts to be used in forming their opinions are protected from disclosure when such persons are testifying or being deposed."

Thus matters considered by experts generally are disclosable in their reports and, therefore, discoverable. There is a split in the districts as to whether the mandatory disclosure obligation imposed by the expert report requirement extends to communications with and from counsel. *See generally* 6 Moore's Federal Practice § 26.80[1][a] (3d ed. 2002). The apparent majority rule, however, is that communications between counsel and testifying expert are privileged. *See, e.g., Manufacturing Administration & Management System v.*

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ICT Group, 212 F.R.D. 110, 115 (D. Mass. 2002). Accordingly, the documents provided by counsel to the expert and the expert's draft reports and notes are generally discoverable. *United Rentals (No. Am.), Inc. v. Maritrend, Inc.*, 2002 U.S. Dist. LEXIS 1306, at *2-3 (E.D. La. Jan. 11, 2002); *Ladd Furniture v. Ernst & Young*, 1998 U.S. Dist. LEXIS 17345, at *34 (M.D.N.C. Aug. 27, 1998).

Consequently, in the first expert hypothetical, ordering experts to destroy drafts and notes generally is sanctionable. *W.R. Grace & Co. v. Zotos International, Inc.*, 2000 WL 1843258, at *10-11 (W.D.N.Y. Nov. 2, 2000). There are, however, a series of open issues—and a fundamental question whether this result is always the right one.

Beware of Drafts Bearing Comments

Comments of Consulting Experts. What if the drafts bear the comments of non-testifying, consulting experts whose work product is generally non-discoverable, subject to the "exceptional circumstances" test of Rule 26(b)(4)?

An important 2001 opinion, *Trigon Insurance Co. v. United States*, 204 F.R.D. 277 (E.D. Va. 2001), holds this material discoverable. The defendant in Trigon retained a respected litigation consulting firm to supply experts (third-party academics) and to assist those experts in preparing their reports. The consulting firm and its principals remained non-testifying experts. The plaintiff sought all drafts worked up between the testifying experts and the consulting firm, and all communications (including e-mail traffic) between them—much of which had not been preserved.

The *Trigon* court held that because the drafts and substantive e-mails were "considered" by the testifying experts in forming their opinions, the materials were discoverable. *Trigon* further ruled that the destruction of these materials was sanctionable because it was intentional, and that spoliation remedies attached regardless of whether the defendant acted in bad faith. The court did not preclude the experts' testimony because that would have interposed a delay prejudicial to the plaintiff (the court would have permitted the defendant to engage new experts). Instead, the *Trigon* court ordered the defendant to engage an outside technology consultant to retrieve as much of this data as possible, with the plaintiff's full participation in the process, and held it "appropriate to draw adverse inferences respecting the substantive testimony and credibility of the experts." *Id.* at 291.

In a late 2002 opinion, the *Trigon* court also awarded the plaintiff more than $179,000 in fees and costs attributable to the spoliation. *Trigon Insurance Co. v. United States*, 2002 U.S. Dist. LEXIS 24782, at *7 (E.D. Va. Dec. 17, 2002).

Interestingly, at the same time that it found sanctionable the destruction of drafts bearing the comments of other experts, the *Trigon* opinion stressed that it was not deciding

> whether a testifying expert is required to retain, and a party is required to disclose, the drafts prepared solely by [the testifying] expert while formulating the proper language in which to articulate that expert's own, ultimate opinion arrived at by the experts' own work or those working at the expert's personal direction ... [and that] ... [t]here are cogent reasons which militate against such a requirement.

204 F.R.D. at 283 n.8. At least one federal judge has issued a Standing Order requiring the production of drafts, but he has carefully carved out "intermediate drafts prepared solely by the testifying expert not provided to or discussed with anyone else." *See Supplemental Order to Order Setting Case Management Conference in Civil Cases Before Judge William Alsup*, at ¶15 (N.D. Cal. Mar. 11, 2003).

The "cogent reasons" alluded to in the *Trigon* opinion were not specified, and, as noted above, other cases expressly allow discovery of draft reports and notes. However, *Trigon* is right that production of all drafts is not the optimal result. Every carefully drafted document has false starts. The quality of the final is not judged by the quantity or quality of the drafts. That is true of judicial opinions and briefs as well as expert reports. For the expert to formulate a reasoned opinion, he or she should be afforded the latitude to filter the facts through the prism of his or her expertise—using whatever process seems most appropriate, without intrusion and without the necessity of attempting to avoid committing matters to writing. If the concern is ghostwriting or undue influence by others, the opposing party should be required to make a prima facie showing that validates that concern before piercing the report and opening underlying matters to discovery.

Regrettably, the proposed distinction in *Trigon* between the work product generated by "those working at the expert's personal direction" and that of the outside consulting litigation firm is also difficult to sustain under Rule 26(a)(2)(B). Moreover, if it were sustained, the expert industry would no doubt

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be restructured so that experts relied only on "employees." But if the relevant concern is ghostwriting, there is no obvious reason why the courts should treat ghostwriting by employees different from that of third parties. The element of personal direction is really the key, and the question is always the same—whether the expert is giving the direction or receiving it: Is there a genuine issue as to just whose opinion the expert is espousing?

Counsel's Comments/Communications with the Expert. As mentioned earlier, the discoverability of communications between counsel and experts has split the courts since 1993. The technical issue is whether the protection for opinion work product set forth in Rule 26(b)(3) is trumped by the disclosure requirement of Rule 26(a)(2)(B). Many courts, like *Karn*, hold that it is and that all communications between counsel and the expert are discoverable. Others, following *Haworth, Inc. v. Herman Miller, Inc.*, 162 F.R.D. 289 (W.D. Mich. 1995), come to the opposite conclusion. The difference between these approaches determines the outcome of the last two hypotheticals. Because the trend in decisions appears to favor the pro-disclosure *Karn* approach, you have to assume that all of your communications with testifying experts are subject to discovery—capturing every exchange between you and your expert, regardless of the substance and regardless of whether there is any doubt that the opinion is in all respects that of the expert. This result favors litigants who can afford separate consulting experts with whom counsel may, for example, exchange ideas as to cross-examination of opposing experts and trial strategy.

In those jurisdictions following the *Karn* approach, drafts of expert reports bearing counsels' comments are discoverable. *Weil v. Long Island Savings Bank*, 206 F.R.D. 38 (E.D.N.Y. 2001). There is the further question of the discoverability of counsel's notes reflecting oral communications with the expert. This is one step removed from the actual communications—assuming that the expert never saw the notes—and necessarily implicates serious opinion work product concerns. The notes should be deemed immune from discovery, absent a prima facie showing that they (1) reflect either misconduct or ghostwriting by counsel or form an important basis of the expert's opinion, and (2) cannot be recreated in any other way (e.g., from testimony by the expert). Some courts have properly shown some reticence in ordering production of such notes. *See, e.g., B.C.F. Oil Refining v. Consolidated Edison Co. of N.Y.*, 171 F.R.D. 57, 66-67 (S.D.N.Y. 1997); *W.R. Grace*, 2000 WL 1843258, at *5; *Amster v. Tiver Capital International Group*, 2002 U.S. Dist. LEXIS 13669 (S.D.N.Y. July 26, 2002). These courts generally require that, to be produced, the notes must actually have been shown to the expert.

Practice Pointers: Expert Communications. This discussion suggests the following practice pointers:

1. Each expert should, upon being retained, be made aware that everything he or she writes or receives, including every e-mail, is potentially discoverable. Nothing should be discarded or purged (better yet, nothing should be written). The expert retention letter should require the expert to maintain everything to show counsel's diligence in this regard. Special efforts must be undertaken by those experts working for organizations whose electronic documents are regularly purged to insure that potentially discoverable material is not destroyed.
2. Lawyers should curtail their written communications with experts and those of others like consulting experts (whose engagement letter similarly should afford notice of the preservation obligation). There is no duty to create exhibits for your adversary.
3. Lawyers should be conscious of the risk that notes of conversations with experts may be discoverable. For years you've urged your clients not to take notes. Now it's your turn.
4. Even if draft expert reports are discoverable, there is no obligation to create them. There is no prohibition against having an expert work on a single version of a single electronic document. *Wechsler v. Hunt Health System*, 2003 U.S. Dist. LEXIS 2589, at *16-17 (S.D.N.Y. Feb. 25, 2003). This will not prevent the adversary from requesting the hard drive of the expert's computer to see what can be electronically discerned. That, however, is expensive and less likely than a routine request for hard copies.
5. Be slow to request any of this discovery from your adversary. You, too, have an expert. It is effectively impossible to ensure that no potentially responsive documents are lost, however hard you try. Mutual assured destruction (nuclear, not documentary) worked for decades. It still has legs.

Electronic Spoliation Problems

Is mere negligence in preserving or promptly producing electronic information sanctionable? Is hiring and heeding electronic data experts any guarantee that sanctions will be avoided?

These are the questions raised by the last hypothetical, and the answer to both questions is no according to the Second Circuit in *Residential Funding Corp. v. DeGeorge Financial Corp.*, 306 F.3d 99 (2d Cir. 2002). *Residential Funding* holds that negligent delay—not destruction, merely delay—in producing electronic data is sanctionable and that, on the facts, the non-producing party's reliance on an outside expert firm (hired to retrieve the data that was sought) was not necessarily a defense to sanctions. A notable aspect of this decision lies in the evident need the court felt to set strict parameters to govern behavior in this area. It applied a negligence standard without even addressing Rule 37(c)(1), which had been triggered and contemplates the imposition of sanctions for negligence in doing and supplementing discovery. The *Residential Funding* court relied instead on a power that requires a showing of bad faith—yet under the court's holding, bad faith need not be shown. All in all, not a good day for trial lawyers.

The plaintiff in *Residential Funding* won a $96.4 million jury verdict. The defendant's sole ground for reversal on appeal was the trial court's denial of a defense motion for sanctions—seeking an adverse inference instruction—to redress the plaintiff's failure to produce voluminous e-mails until after trial had begun. The plaintiff claimed, and the trial court evidently accepted, that the e-mail was produced belatedly because the plaintiff's outside expert was unable to retrieve it from backup tapes the plaintiff provided to the defense as the jury was empanelled. *Id.* at 110 n.5. (The appeals court seemed skeptical about this explanation because the defense expert was able to retrieve hundreds of thousands of e-mails within four days of receiving the backup tapes.)

In the absence of bad faith or gross negligence, the trial court declined to sanction the plaintiff and rejected the adverse inference instruction. The Second Circuit vacated the

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order denying sanctions and held that even negligently delayed production is sanctionable and subject to an adverse-inference instruction. It ordered vacatur even though there was no showing that the unproduced e-mail contained any damning evidence—indeed, the trial court had invited the defendants to move for a new trial if any were discovered. No such motion evidently was made.

The *Residential Funding* court's legal analysis has broad implications. The court looked first to Rule 37(b)(2) because the belated production of the electronic discovery at some point transgressed an order of the lower court. Rule 37(b)(2) provides that simple "fail[ure] to obey an order to provide or permit discovery" suffices to support a sanctions award. Consequently, there is nothing remarkable about the court's holding that disobedience of a valid discovery order is sanctionable even if the offender claims that the failure to obey was negligent rather than intentional. The offender's state of mind may affect the severity of the sanction that is apt, however. *See generally* Joseph, *Sanctions: The Federal Law of Litigation Abuse* §§ 48-49 (3d ed. 2000).

Further, although an adverse-inference instruction is not specifically identified as a permissible sanction in Rule 37(b)(2), the Second Circuit seemed to view it as a lesser-included of deeming "matters ... to be established" (Rule 37(b)(2)(A)). *See* 306 F.3d at 106-07. In all events, the *Residential Funding* court stressed that Rule 37(b)(2) authorizes the trial judge to "make such orders in regard to the failure as are just," and this has long been held to support an adverse-inference instruction in appropriate circumstances.

This analysis, however, addresses only the situation in which a court has ordered production. Is an adverse inference instruction available for negligent non-production in the absence of a court order? The *Residential Funding* court held that it is, observing that even in the absence of a court order, sanctions are awardable for dilatory discovery tactics, citing the inherent power of the court as the source of this sanctioning power. 306 F.3d at 107. Inherent-power sanctions, however, require a showing of bad faith. *Chambers v. NASCO, Inc.*, 501 U.S. 32 (1991) ("the narrow exceptions to the American Rule effectively limit a court's inherent power to impose attorneys' fees as a sanction to cases in which a litigant has engaged in bad-faith conduct or willful disobedience of a court's orders"). The Second Circuit did not discuss this prerequisite, and it would appear to be incompatible with a sanction based on negligence, at least in the absence of court order.

An alternative source of sanctioning power in this circumstance, however—one not requiring any showing of bad faith—is Rule 37(c)(1). As discussed above, this rule is no longer limited to disclosure violations but also provides that a failure to supplement discovery responses seasonably (as required by Rule 26(e)(2)) triggers not only the presumptive exclusion of the unproduced evidence but also authorizes the trial judge to "impose other appropriate sanctions ... and may include informing the jury of the failure to make the disclosure." This is essentially what the defendant in *Residential Funding* sought, but it does not appear from the opinion that anyone called this rule to the attention of the court. In any event, although the Second Circuit did not address it, this rule supports the result reached by the court.

Under *Residential Funding*, an adverse-inference instruction is available for either spoliation or delayed production if three criteria are satisfied:

1. A party had an obligation to preserve or produce the evidence;
2. That party failed to do so with "with a culpable state of mind;" and
3. The destroyed or missing evidence was "relevant" to the claim or defense of the other party seeking discovery such that a reasonable trier of fact could find that it would support the claim or defense (ultimately this is a jury issue).

Id. at 107-08.

Residential Funding expanded the "culpable state of mind" (factor two) to encompass negligence, reasoning: "The sanction of an adverse inference may be appropriate in some cases involving the negligent destruction of evidence because each party should bear the risk of its own negligence." *Id.* at 108 (citing U.S. Magistrate Judge James C. Francis, IV).

As for factor three, the *Residential Funding* court set the bar of "relevance" above that set by Federal Rule of Evidence 401, requiring that the party seeking the adverse inference adduce sufficient evidence from which a reasonable trier-of-fact could infer that the destroyed or unavailable evidence

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Rule Traps

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"would have been of the nature alleged by the party affected by its destruction" or non-production. At the same time, the Second Circuit stressed that courts should not hold the victim of non-production "to too strict a standard of proof" because to do so would "subvert the ... purposes of the adverse inference" and allow profit from misconduct. *Id.* at 108-09.

The court emphasized that if bad faith or gross negligence is shown, that alone usually is sufficient evidence of relevance to go to the jury with an adverse-inference instruction. *Id.* at 109. It also stressed that bad faith or gross negligence (as well as simple negligence) may be shown by proof that a party failed to hire an expert to assist with electronic production as soon as the party realized that it could not retrieve potentially responsive data on its own. The *Residential Funding* court added that continued reliance on an expert who is not producing results also may give rise to an inference of a "culpable state of mind." *Id.* at 111. As trial approaches and the need for prompt production escalates, the Second Circuit held, "purposefully sluggish" acts may be sufficient to warrant the imposition of sanctions, including an adverse-inference instruction. *Id.* at 112.

Practice Pointers: Electronic Spoliation Problem. The Second Circuit's decision may not be followed in all jurisdictions, but Rule 37(c)(1) will apply. This has several practical repercussions for electronic discovery practice:

1. To avoid any prospect of sanctions, it is essential to address the issue of electronic data preservation at the inception of the case (which, for the plaintiff, precedes filing). It is necessary to take early, reasonable steps to ensure the protection of potentially responsive data because the negligence rationale of *Residential Funding*, as it applies to document destruction, is not limited to the period that commences with service of a document demand.
2. Although there is no reason why counsel may not rely on a client to furnish the needed electronic expertise, it is not enough—whether the expert is in-house or outside—simply to rely on a statement of the expert that discovery demands cannot be honored because the expert is unable to retrieve the data that is sought. If the expert is in-house, moreover, any claim of inability is inherently suspect and will be subject to greater attack if the adversary's expert is able to retrieve the data. After the expert is engaged, counsel must monitor the expert's progress and, if he or she cannot retrieve the data from the underlying source, counsel will have to consider whether supplemental expert assistance is required or the data source should be made accessible to the opponent (either directly or perhaps through an intermediary firm, if this is essential to preserve confidentiality of nonresponsive data).
3. Although discovery ordinarily is frowned upon on sanctions motions, the issue of retrievability and relevance of unproduced data may be discoverable. The Second Circuit remanded for discovery in *Residential Funding*, specifically allowing depositions of affiants proffered by the non-producing party below. *Id.* at 112.
4. The fact that the missing electronic data proves to be irrelevant in fact is not necessarily a complete defense to sanctions—it is a defense to the sanction of an adverse inference (or, presumably, any harsher sanction). The court still may impose a lesser sanction, such as an award of fees incurred in bringing the sanctions motion or, if there is an appeal as in *Residential Funding*, may sanction a successful litigant by denying it post-judgment interest (where, as in *Residential Funding*, the delay produced by the appeal on the discovery/sanctions issue is deemed a product of the sanctionable behavior). *Id.* at 112-13.
5. Just as the irrelevance in fact of the unproduced data is not a complete defense to sanctions, neither is the fact that the non-production is not made "with a culpable state of mind." The absence of a culpable state of mind will not preclude the imposition of an appropriate sanction other (and lesser) than an adverse inference, such as an award of fees and costs. Non-production, alone, is sanctionable, under both Rules 37(b) (if it flouts an outstanding order of the court) and 37(c)(1) (even in the absence of an order). ◻

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